REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

30/5/14

Case number: 24868/2006

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

30/5/14 .....
DATE

.....
SIGNATURE

In the matter between:

In the matter between:

S.C. OMAR	**FIRST APPLICANT**
SUPERSPEED CC	**SECOND APPLICANT**

and

MINISTER OF SAFETY AND SECURITY	**FIRST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS	**SECOND RESPONDENT**
INSPECTOR SKIP VAN DER MERWE	**THIRD RESPONDENT**

J U D G M E N T

HIEMSTRA AJ

[1] On 16 November 2004 the third respondent, an Inspector in the South African Police Service (SAPS), and other police officers seized certain items in accordance with the provisions of the Criminal Procedure Act, 51 of 1977 (CPA). The seizure followed an investigation into an alleged hijacking of trucks used for the transportation of goods. The volume of the goods was so large that the SAPS could not store them. Some of the goods were then returned to persons who had identified themselves as the owners of the goods and others were retained by the SAPS. Criminal charges were later withdrawn as the docket went missing.

[2] The applicants claim that they are the rightful owners of the goods and brought an application under the above case number for the return of the goods. The matter was settled on 19 June 2007 and this Court per Van der Merwe J, as he then was, made the settlement agreement an order of court. In terms of the settlement agreement the first and/or the third respondent were ordered to place the first applicant in possession the items listed in the agreement within 48 hours of the date of the order.

[3] Following the order, the third respondent returned some of the goods to the applicants. As I have said, other items were handed to persons who had identified themselves as the owners. The respondents purported to have done so in accordance with s 30 of the CPA[1]. The third respondent also retained four diamonds[2] and ammu-

[1] The return of the goods to the alleged owners was unlawful in terms of s 30. It could only have been done with the consent of the persons from whom the goods were seized and the alleged owners should have been warned to retain the items for production in any resultant criminal proceedings.
[2] The respondents claim that they are not diamonds, but cubic zirconium. Ismael J seems to have accepted in a judgment referred to later in the course of this judgment that they were cubic zirconium. Nothing turns on this factual dispute.

nition which he claims he was not permitted to hand over to anyone who is not licenced to possess them.

[4] The first and third respondents did not fully comply with the settlement agreement. They maintained that save for the "diamonds" and ammunition they were no longer in possession thereof. The applicants then applied to this court under the above case number for an order for variation of the order of Van der Merwe J by adding a prayer to the effect that in the event of the first and third respondents not not returning the goods that they be ordered to pay certain amounts to the applicants, and further that the first and third respondents be held in contempt of the order of van der Merwe J. The matter came before Ismail J. His *ex tempore* judgment is attached to the application. However, it is not clear exactly what his order was. It states that an order is granted "*In terms of the document marked 'Jasmine'.* No such document is before court.

[5] Whatever the exact order was, the applicants appealed to a full bench of this court. The court of appeal, per Victor J, held that an order to return the goods would be a *brutum fulmen* as the goods had been disposed of and were incapable of being returned. The court then examined whether it could award damages on application where the value of the goods was contested. The court referred to ample authority to the effect that it is impermissible to award damages on affidavit and dismissed the appeal.

[6] The applicants now again apply for a variation of the order made by van der Merwe J by adding the following:

"1. *In the event of the 1st and 3rd Respondents not returning the goods as contemplated in orders (1) – (3) above within 30 days of this order, then this matter is hereby referred to oral evidence to establish the value of the goods, referred to in (1) to (3) above.*

2. *Upon this Honourable Court determining the value of the goods mentioned in (1) – (3) above, the 1st and 3rd Respondents will be liable jointly and severally, the one paying, the other to be absolved, to pay the Applicants the amounts so established , with interest thereon at the rate of 15,5% per annum from 16 November 2004.*"

[7] The first observation to be made is that this application for variation is made nearly seven years after the granting of the order. It was held in *Di Meo v Capri Restaurant*[3] that an application for a referral to *viva-voce* evidence should be made at the earliest possible time and should not be allowed at a time when the matter has already been argued and the applicants at that time realise that they have taken the wrong avenue.

[8] It is trite law that an applicant, who initiates proceedings by way of motion when he should foresee that a dispute of fact must inevitably arise, does so at his peril[4]. The applicants should have known that the value of the goods was not common cause and should from the outset have instituted action, or should have, at the latest, applied for the question of the value of the goods for oral evidence when the matter came before Ismael J.

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[3] 1961 (4) SA 614 (N)

[4] *R Bakers (Pty) Ltd v Ruto Bakeries (Pty) Ltd 1948 (2) SA 626 (T); Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)*

[9] The applicants have in any event made out no case for the variation of the order. In terms of Rule 42 of the Rules of this court, the jurisdictional requirements for such an order are:

(a) the order or judgment must have been erroneously sought or granted in the absence of any party affected thereby;

(b) the order or judgment must contain an ambiguity or patent error or omission; or

(c) the order or judgment must have been granted as a result of a mistake common to the parties.

The applicants made no attempt to address these requirements.

[10] Moreover, the purpose of the power of this court to vary or rescind its own orders or judgments is to correct expeditiously an obviously wrong judgment or order.[5] As I have said, the order sought to be varied was issued nearly seven years ago.

[11] Mr Omar, appearing for the applicants, argued vigorously that the attorney for the respondents had committed fraud when he entered into the settlement agreement which van der Merwe J had made an order of court. He had, so goes the argument, misled the court into believing that the goods were available to be returned. Relying on *Rowe v Rowe*[6], he argued that the order therefore stands to be varied. This decision is indeed authority for his proposition that an order may be varied when it had been granted as a result of fraud. The respondents deny that their attorney had committed fraud and contend that he had made a *bona fide* mistake. It is not possible on the papers to decide whether the attorney had deliberately misled the court. How-

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[5] *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimovitz* 1996 (4) SA 411 (C) at 421G; *Roopnarain v Kamalapathy* 1971 (3) SA 387 (O)

[6] 1997 (4) SA 160

ever, even if I find that he did, it is no longer relevant. The applicants are solely to blame for their refusal or failure to follow the correct procedures.

[12] By not granting the order sought I do not purport to condone the behaviour of the respondents. They have strung the applicants along for years by not returning whatever they could when it became clear that criminal proceedings would not be pursued. Moreover, their attorney should not have agreed to the settlement agreement while it was not possible to comply with it, whether he did so deliberately of negligently.

Therefore, I make the following order

The application is therefore dismissed with costs.

J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:	26 May 2014
Date of judgment:	30 May 2014
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